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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 15 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a research scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we withdraw any inference that the petitioner must demonstrate "extraordinary ability" for the benefit sought. We also withdraw the director's concern that the proposed benefits of the beneficiary's research would not be national in scope. Nevertheless, we uphold the director's ultimate conclusion that the petitioner has not demonstrated why a waiver of the alien employment certification process would be in the national interest.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Immunology from the Tokyo Women's Medical University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is

whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, immunology. The director then concluded that the petitioner had not established that the proposed benefits of his research would extend beyond his employer. The proposed benefits of the petitioner's research include enhancement of immune therapy of cancer and a decrease of organ transplant rejections. We are satisfied that these proposed benefits would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner submitted evidence of his membership in the American Association of Immunologists. [redacted], the membership coordinator, asserts that regular membership requires possession of a medical or doctoral degree, being "an established scientist with substantial achievement in a related discipline," and/or being an author of one article in immunology in a reputable peer-reviewed English language journal. [redacted] does not specify whether a member must meet all of these requirements.[1] Professional memberships are merely one of the categories of evidence that can be used to demonstrate exceptional ability, a classification that normally requires an approved alien employment certification. Section 203(b)(2) of the Act; 8 C.F.R. § 204.5(k)(3)(ii)(E). The petitioner also submitted evidence that the China Association of Science and Technology issued the beneficiary a dissertation award. While the petitioner did not submit a complete certified translation of the accompanying material about this award as required under 8 C.F.R. § 103.3, it appears from the foreign language document and partial translation that the association issued several of these awards. Once again, recognition for achievements and significant contributions are another category of evidence that can be used to establish eligibility as an alien of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(F).

Meeting two of the criteria for exceptional ability, or even the requisite three criteria for that classification, is not determinative of the matter before the AAO. By statute, "exceptional ability" is not, by itself, sufficient cause for a national interest waiver. *NYSDOT,* 22 I&N Dec. at 218. Thus,

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[1] According to the association's website, http://aai.org/membership/regular.htm (accessed December 2, 2010 and incorporated into the record of proceeding), the associate requires a medical or doctoral degree and authorship of one publication. These requirements can be waived under exceptional circumstances if the candidate shows a substantial research accomplishment. As the petitioner has a medical and doctoral degree and has authored more than one article, it is clear that the petitioner's membership did not depend on demonstrating a substantial research accomplishment.

the *benefit* which the alien presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated for that classification. *Id; see also id.* at 222.

The petitioner also submitted evidence that he was invited to review 14 programs for the Chinese National Natural Sciences Foundation Committee. The record does not confirm that he actually performed this review. On appeal, the petitioner submitted evidence that the committee employs "experts that have a fairly high academic level and good professional ethics in the same field to evaluate the applications for funded projects." While the request may be indicative of the committee's recognition of the petitioner's academic credentials and professional ethics, the request does not establish that the petitioner has already influenced the field as a whole.

The record confirms that the petitioner was the program head of a research project funded by the Chinese National Natural Sciences Foundation Committee. The vast majority of research, if not all research, receives funding from some source. We are not persuaded that every researcher who has worked with a government grant inherently serves the national interest to an extent that justifies a waiver of the alien employment certification requirement.

The petitioner submitted copies of 26 articles he has authored and several presentations. While this evidence reflects that the petitioner is a prolific author, at issue is his influence in the field. The director and counsel both addressed the number of citations of the petitioner's work in the aggregate. Given the number of articles the petitioner has authored, however, it is much more instructive to look at the number of citations individual articles have garnered. Most of the petitioner's articles have garnered only a handful of citations. Two of the petitioner's articles have garnered moderate citations. A review of the articles that cite the petitioner's moderately cited [redacted] however, reveals that three of the citing articles have garnered 84, 96 and 137 citations each. Thus, it is clear that the petitioner works in a field that can generate large numbers of citations.

Finally, the petitioner submitted reference letters in support of the petition. [redacted], a professor at Fudan University, indicates that he supervised the petitioner's research at that institution. [redacted] first discusses the petitioner's doctoral research at the Tokyo Women's Medical University. Specifically, [redacted] asserts:

> [The petitioner] discovered that the large parts of T cell populations in mice can recognize the bacterial Superantigen, Staphylococcal Enterotoxin A (SEA), in vivo stimulation, and that SEA-reactive distinct T cells' expansion depends on the T cell receptor Vβ chain.

While [redacted] asserts that this discovery is important to the treatment of patients with Staphylococcal infection in clinic therapy, he does not identify any independent clinic or hospital that has changed its treatment strategy for this infection based on the petitioner's work.

[redacted] further asserts that the petitioner found that the function development stage of naive cord blood CD4+ T cells was between that of thymic and peripheral T cells. During the same study, the petitioner found that the phenotype of cord blood CD4+ T cells was at the transition stage from thymocyte to adult naive CD4+ T cell of peripheral blood. [redacted] asserts that the petitioner published and presented this work, which demonstrated that post-thymic maturation is necessary for T cell maturation and development. [redacted] does not explain, however, how this work has impacted the field.

[redacted] then discusses the petitioner's work at Fudan University. Specifically, [redacted] explains that the petitioner continued to study thymus development, discovering that an "extracellular matrix, alpha-dystroglucan, is expressed on fetal thymocytes, especially on double positive T cells, and is also involved in [the] positive selection of thymocytes by participating in the immunologic synapse formation." [redacted] asserts that the results of this work are novel and have shed new light on thymocyte development but, once again, does not explain how this work is being applied in the field.

Next, [redacted] discusses the petitioner's work with the receptors involved in lymphocyte activation. [redacted] explains that overactive immune responses account for autoimmune diseases and graft rejection while a T cell deficiency results in tumor formation and microorganism invasiveness. Thus, concludes [redacted] the petitioner's findings regarding the role of matrix molecules in T lymphocytes activation improved the field's understanding of interaction and recognition between immunocytes and "could contribute to diseases prevention and treatment." [redacted] speculation as to the future impact of this work is insufficient evidence that the petitioner has already had an influence in the field.

Finally, [redacted] discusses the petitioner's work with organ transplantation immunology by investigation the role of the B7 antisense peptide in blocking a relevant pathway and inhibiting the transplantation rejection. [redacted] concludes that the petitioner's demonstration of the success of synthetic B7 antisense "provides a practical method that improves the survival of patients who received organ transplantation." [redacted] provides no statistics reflecting that hospitals are using synthetic B7 based on the petitioner's work or that transplant rejections have decreased because of the petitioner's work.

On appeal, [redacted] one of the petitioner's former collaborators at Fudan University, discusses the petitioner's role in their collaborative projects and asserts that "co-authorship should not diminish one's contributions to a given research project." At issue, however, is whether this work has influenced the field.

[redacted] an assistant professor at the Mount Sinai School of Medicine, discusses the petitioner's initial and current work at that institution. Initially, the petitioner focused on inflammatory signal transduction pathways in kidney disease. [redacted] explains that the petitioner discovered that mice have increased susceptibility to acute Endoplasmic reticulum (ER) stress injury in the kidney when they are in a status comparable to chronic inflammation or aging. [redacted] further asserts that the beneficiary's study showed that TNFα increased cell death caused by the drug Tunicamycin by two-fold and that "elevated TNFα may play a role in increasing the susceptibility to ER stress injury in

kidneys of old mice. While [redacted] asserts that this work is novel and appeared in print, he does not explain how this work is being applied in the field.

Next, [redacted] asserts that the beneficiary's current research "focuses on intervention of immune tolerance induced by small molecule to enhance immune therapy of cancer." [redacted] explains the background of this research, which suggests that tumors spread by suppressing the immunity of the patient through an increase in myeloid-derived suppressor cells (MDSC). [redacted] continues:

> [The petitioner] was the first to discover that cytokines can induce MDSC production and that small compounds can regulate the suppressive functions of MDSC to facilitate immune tolerance. This work has practical applications in clinic medicine. For example, [the petitioner's] finding shows that in order to utilize [the] immune suppressive function of MDSC, doctors can induce MDSC in autoimmune disease and organ transplantation patients using these small compounds to treat autoimmune disease and improve the survival of the transplanted organ.

[redacted] provides no examples of the petitioner's work actually being applied by any independent clinic or hospital to reduce transplant organ rejection.

[redacted] also asserts that this work relates to cancer treatment and speculates that "the completion of [the petitioner's] study will result in a better understanding of the mechanisms of action by these small compounds and immune tolerance, which may lead to the discovery of novel targets for the intervention in tumor-associated immunosuppression." This statement is highly speculative and does not explain how the petitioner has already influenced the field.

As noted by counsel on appeal, the record also contains letters from references who have not worked with the petitioner. We are not persuaded that the mere ability to secure letters from independent references warrants a waiver of the alien employment certification process. We must examine the content of those letters.

[redacted] provides an independent letter in support of the petition. [redacted] while not one of the petitioner's collaborators, has coauthored articles with [redacted] praises the petitioner's work on the development, differentiation and maturation of thymus and T-cell activation. [redacted] explains that this work is an important finding regarding how extracellular matrix proteins affect the functions in lymphocyte development and activation. [redacted] further explains that the petitioner's work "has provided new clues on the mechanism of T cell activation in T cell-mediated diseases." [redacted] asserts that this work "facilitated further research on extracellular matrix proteins involved diseases." As an example, [redacted] references published research from Radboud University in the Netherlands. While the record contains evidence that this research group has cited the petitioner's work, the record does not contain the actual article to establish the context of the citation and the petitioner did not submit a letter directly from these researchers.

[redacted] then discusses other research addressed in detail above but does explain how any of the petitioner's results are being applied in the field. For example, [redacted] asserts that the petitioner's research on thymic cord blood "helps the medical research community better interpret the different symptoms and prognosis in children and adult infections diseases" but does not provide a single example of an independent medical establishment using the petitioner's research in this way.

Finally, [redacted] asserts that using MDSC to treat autoimmune diseases "is an extremely novel idea" with "broad clinical application." [redacted] acknowledges, however, that the petitioner was only preparing this research for publication and does not suggest that the petitioner's work has led to the use of MDSC to treat autoimmune diseases even at the clinical trial level.

[redacted] a senior scientist at Boehringer Ingelheim Pharmaceuticals, also supports the record. Once again, [redacted] has not collaborated with the petitioner but has coauthored articles with [redacted] asserts that the petitioner's "findings on the immunological synapse formation during T cell maturation and activation have provided useful information to aid in my and others' research to better design and develop therapies for immunological diseases." [redacted] does not explain how he utilized the petitioner's work or what results he obtained by applying the petitioner's work.

[redacted] an assistant professor at the Medical College of Georgia, also provides an independent letter of support. [redacted] states that the petitioner's work "contributes substantially to the elucidation of the mechanisms of T cells function," "shed new light on the abnormal activation mechanism of T lymphocytes in autoimmune diseases" and provided "a novel method that uses B7 antisense peptide against graft rejection to prolong the survival of [a] transplanted organ." [redacted] however, provides no examples of how the petitioner's work is influencing the field and does not claim to have applied the petitioner's work.

While the petitioner's research is no doubt of value and may have practical applications, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or other research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. None of the references explain how the petitioner's work is being used in the field by independent researchers or at independent medical facilities in practice or through clinical trials.

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial

evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions that the petitioner has performed important research without providing specific examples of how those innovations have influenced the field. Merely repeating the language of the legal standard for the benefit sought does not satisfy the petitioner's burden of proof.[2] The petitioner's independent letters do not explain how the authors have applied the petitioner's work. The petitioner also failed to submit sufficient corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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[2] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.